



TC08020

INCOME TAX – discovery assessments – whether or not there was a discovery for each of the relevant years – yes – whether or not the appellant’s agents’ role affected the position – no – penalties – whether or not the appellant was careless – yes – whether or not the penalties should be reduced – yes to the extent agreed by the parties – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/00509

BETWEEN

SHANE BURKE

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE RICHARD CHAPMAN QC
MR NOEL BARRETT**

Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA on 27 November 2019. A summary decision was released on 29 July 2020, a late application for a full decision was made on 28 August 2020, and (following an opportunity for submissions) HMRC did not object to the late application.

Mr Joseph Donohue, Accountant, and Mr Martin Christie, Solicitor for the Appellant

Mrs Kate Murphy, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal relates to the following discovery assessments pursuant to section 28 of the Taxes Management Act 1970 (“the TMA 1970”) and penalty assessments pursuant to schedule 24 of the FA 2007:

(1) In respect of 2011/12, a discovery assessment in the sum of £2,863.17 and a penalty assessment in the sum of £2,004.21 (although the amount of the penalty has now been agreed at £858.95).

(2) In respect of 2012/13, a discovery assessment in the sum of £3,823.20 and a penalty assessment in the sum of £2,676.24 (although the amount of the penalty has now been agreed at £1,146.96).

(3) In respect of 2013/14, a discovery assessment in the sum of £2,399.46 and a penalty assessment in the sum of (although the amount of the penalty has now been agreed at £719.83).

(4) In respect of 2015/16, a penalty assessment in the sum of £4,465.86 (although the amount of the penalty has now been agreed at £1,913.94).

FINDINGS OF FACT

2. We read a witness statement from Mr Timothy Smith (the decision-making officer) on behalf of HMRC. Although Mr Smith attended the hearing, no further evidence was presented and he was not cross-examined. Mr Burke did not attend the hearing as he was in Canada, there was no written witness statement from him or anybody else on his behalf, and Mr Donohue and Mr Christie did not call any other witnesses.

3. We make the following findings of fact based upon the evidence and documents made available to us at the hearing in the light of the submissions made. In doing so, we bear in mind that the burden of proof in establishing that the discovery assessments were properly made is upon HMRC, that the burden of proof in establishing that the quantum of the assessments is wrong (if so submitted) is upon Mr Burke, and that the burden of proof in establishing that the penalties have been correctly charged under schedule 24 of the Finance Act 2007 (“FA 2007”) is upon HMRC.

4. During the periods that the assessments relate to, Mr Burke was a self-employed civil engineer sub-contractor.

5. Mr Burke appointed a firm of accountants, Kumarans, to act on his behalf in respect of each of these periods. In doing so, he authorised Kumarans to act as his agent.

6. In respect of each of Mr Burke’s self-assessment returns for the years from 2011/12 to 2015/16, Mr Burke provided his documents to Kumarans. Mr Burke states in his notice of appeal that he attended at Kumarans’ office to do this on an annual basis but that he did not have any other involvement in the preparation of the returns, did not sign any returns, and did not receive a copy of the returns submitted. HMRC did not challenge this assertion in their statement of case, Mr Smith’s evidence or Mrs Murphy’s skeleton argument. We therefore accept Mr Burke’s assertion.

7. Kumarans filed three versions of Mr Burke’s 2015/2016 self-assessment return. The first was submitted on 9 May 2016 and (wrongly) claimed an exemption from Class 4 National Insurance Contributions, which was then removed by the second version submitted

on 16 June 2017. The third was submitted on 11 July 2017 and increased the claim for business expenditure by £10,000 to £30,015, resulting in a claim for repayment of £4,058.

8. On 15 May 2017, HMRC opened an enquiry into Mr Burke's 2015/16 self-assessment return. This enquiry focused upon Mr Burke's claim to business expenditure of £30,015.

9. A series of telephone calls took place between HMRC and Mr Burke and between HMRC and Kumarans between 19 May 2017 and 1 June 2017. The tenor of these telephone calls was that the information and documents supporting the claim for business expenditure were with Kumarans, who would supply them to HMRC.

10. HMRC issued an information notice under schedule 36 of the Finance Act 2008 issued on 10 July 2017 ("the Information Notice"). In particular, the Information Notice requested the following information and documents:

"An itemised breakdown of your claim to business expenditure of £30,015.

All receipts, purchase invoices and any other documentation held when preparing your return to verify your claim to business expenses for the period from 6 April 2015 to 5 April 2016 of £30,015.

Please let me have detail of the nature of your business for example the type of work that was undertaken from 6 April 2015 to 5 April 2016."

11. Kumarans telephoned HMRC on 21 July 2017, promising to supply the information in the Information Notice. However, this was not forthcoming, resulting in penalties for non-compliance with the Information Notice on 21 August 2017 and 25 September 2017.

12. By an email dated 8 September 2017, Mr Burke informed HMRC that he had been unable to contact Kumarans.

13. By a letter dated 9 October 2017, Mr Smith informed Mr Burke that he had been unable to obtain records despite confirmation from Kumarans that they would be provided. Mr Smith also stated as follows:

"After reviewing your self-assessment I am of the view that the expenses claimed are excessive for someone of your trade and I have specific concerns regarding the third amendment made to your 2015/16 self-assessment (dated 11/07/2016 at 22:09) which increased your allowable expenses from £20,015 to £30,015 an increase of 50%. In our conversation dated 19/0/2017 I questioned why there had been such an increase and you were unable to offer an explanation, adding there had been no unusual "large" purchases. As you have been unable to offer any explanation for the expenses increase and as yet have supplied no documentary evidence to act as proof of expense claimed I propose to reduce the expenses figure down to a level which would be acceptable for a person of your trade. In order to do this I have used my best judgement and feel that expenses to the value of 20% of your turnover is reasonable. This means that your expenses would be reduced down to the sum of £14,825 leaving self-employed profit of £59,301. If this were to be applied to your 2015/16 return your liability has been recalculated and shown on the attached calculations, with the result being an overpayment of £4508.23 being amended to an amount due of £1871.57.

I must also inform you that my findings have an impact on previous years' returns. Where I find inaccuracies in a return I am required to consider whether the same inaccuracies would have been present in earlier year's returns. If so then I must also consider making adjustments to those earlier years' returns.

The number of years that HMRC looks back depends upon the customer behaviour that led to the inaccuracies. The time limits are behaviour considered to be “mistake” up to four years, “careless” up to six years, “deliberate” up to twenty years.

In this case I am proposing to make adjustments to years 2011/12, 2012/13 and 2013/14. In order to recalculate your liability I will use the method outlined previously and will reduce your expenses down to 20% of turnover. Currently I am not proposing any changes to your 2014/15 return as expenses stand at 21% of your turnover.”

14. The parties agree that Mr Burke’s returns for the years 2011/12, 2012/13 and 2013/14 provided for expenses substantially above 20% of turnover.

15. HMRC issued a penalty explanation dated 7 November 2017. These treated the intended penalties as relating to deliberate behaviour.

16. Mr Burke appointed Chartwell Financial Ltd (“Chartwell”) as his agent in November 2017. Chartwell spoke to HMRC on 4 December 2017. HMRC’s note of the telephone call was within the documents before us and, given that it has not been challenged, we treat it as an accurate record of what was said. The note includes the following:

- “1) Agent feels adjustments made to 15/16 return are reasonable.
- 2) Agent feels there are no grounds for discovery provisions, claiming that additional information is required for discovery provisions and nothing provided therefore no grounds for discovery.
- 3) Agent believes that the 70% penalties applied are excessive as Mr Burke cooperated to the best of his ability.
- 4) Agent is preparing customers 16/17 return, all documents provided to previous agents (so again no evidence). It was agreed that expenses were 20% of turnover.
- 5) Agent raised possibility that customer has been victim of fraud with previous agent as perpetrator, however at this stage there is no evidence.”

17. On 12 December 2017, HMRC issued a closure notice for the year 2015/16 and issued discovery assessments in respect of 2011/12, 2012/13 and 2013/14.

18. On 19 December 2017, HMRC issued penalty assessments in respect of 2011/12, 2012/13 and 2013/14. These penalty assessments were not accompanied by any penalty explanations and were clearly lower than the explanations sent on 7 November 2017. The penalty assessments have been suspended.

19. Penalty explanations were subsequently sent on 16 October 2018 which matched the sums assessed and treated Mr Burke’s behaviour as careless and gave no reduction for the quality of disclosure.

20. Mr Burke issued a notice of appeal to the Tribunal on 18 January 2018. HMRC have treated this as an appeal to HMRC and so take no issue with the Tribunal’s jurisdiction to hear the appeal.

ISSUES

21. Mr Burke’s grounds of appeal were effectively as follows:

- (1) The conditions for the discovery assessments were not met.
- (2) Mr Burke should not receive any penalties because he acted responsibly and Kumarans disappeared without providing him or HMRC with any documentation.

(3) The penalties are excessive.

22. Mr Donohue and Mr Christie confirmed during their submissions that Mr Burke does not challenge the quantum of the discovery assessments. It follows that the only issue as regards the discovery assessments is as to whether or not HMRC have established that there was a discovery for each of the relevant years.

23. Mrs Murphy's skeleton argument proposed reductions in the penalties to £858.95 for 2011/12, £1,146.96 for 2012/13, £719.83 for 2013/14 and £1,913.94 for 2015/16. Mr Donohue and Mr Christie confirmed that these revised figures were agreed. We also note that no argument as to special circumstances was raised by Mr Donohue and Mr Christie. The parties agree that if the discovery assessments are not valid then the penalty assessments will not be valid either. It follows that the only distinct issue in respect of the penalty assessments is whether or not Mr Burke was careless.

THE LEGAL FRAMEWORK

24. Section 9A of the TMA 1970 provides for notices of enquiry. Section 9A(2) provides for the following time limit:

“(2) The time allowed is –

(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered.

(b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered.

(c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.

For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October.”

25. Section 29 of the TMA 1970 deals with assessments where loss of tax is discovered. The relevant sub-sections in the context of the present dispute are as follows:

“(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

...

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above –

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

Unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board –

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year or assessment; or

(b) in a case where a notice of enquiry into the return was given –

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice, the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting the same capacity as the in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above –

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above –

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes –

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods;

...

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.”

26. Section 36 of the TMA 1970 provides for a time limit of six years from the end of the year of assessment to which it relates as follows:

“(1) An assessment on a person in a case involving loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it

relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

...

(1B) In subsections (1) and (1A) references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.”

27. Section 118(5) the TMA 1970 provides as follows:

“(5) For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation.”

28. The relevant paragraphs of schedule 24 of the FA 2007 provide as follows:

“1 Error in taxpayer’s document

(1) A penalty is payable by a person (P) where

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to –

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P’s part.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

...

3 Degrees of culpability

(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is –

(a) “careless” if the inaccuracy is due to failure by P to take reasonable care,

(b) “deliberate but not concealed” if the inaccuracy is deliberate on P’s part but P does not make arrangements to conceal it, and

(c) “deliberate and concealed” if the inaccuracy is deliberate on P’s part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P’s part when the document was given, is to be treated as careless if P –

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC.”

29. We were also referred to (and have considered) section 8 of the TMA 1970, Schedule 36 of the Finance Act 2008, and Schedule 23 of the Finance Act 2011. However, given the narrowing of the issues we have not set these out within this decision.

THE DISCOVERY ASSESSMENTS

The Parties' Submissions

30. Mr Donohue and Mr Christie's submissions can be summarised as follows:

(1) There was no discovery as no new information had come into HMRC's possession to show that the returns were incorrect.

(2) All information was already in the hands of HMRC and could be seen from the returns themselves as the expense levels were very high.

(3) Although Mr Burke's grounds of appeal suggested that it was to be argued that a notice of enquiry was a pre-condition of a discovery assessment, Mr Donohue and Mr Christie (correctly in our view) did not pursue this. Instead, they argued that the absence of a notice of enquiry for the years other than 2015/16 shows that HMRC did not question the information that they had when the returns were made.

(4) The fault lay with Kumarans.

31. Mrs Murphy's submissions can be summarised as follows:

(1) HMRC rely upon s29(4) rather than s29(5) of the TMA 1970. As such, the information available is only relevant to whether or not there was a discovery rather than whether or not the second condition at section 29(5) is made out.

(2) HMRC discovered that the expenses for 2011/12, 2012/13, and 2013/14 were excessive when Mr Burke was unable to provide any justification for his expenses in 2015/16.

(3) Mrs Murphy relied upon *Johnson v Scott* (1976-1980) 52 TC 383 and *Nicholson v Morris* 51 TC 95 to the effect that HMRC are able to make best judgment assessments and that the onus is upon the taxpayer to dispute this with evidence proving his assertions. Mrs Murphy also relied upon *Jonas v Bamford* 51 TC 1 to establish what she termed a presumption of continuity. We have considered these authorities but have not set them out as the amount of the assessments themselves (as distinct from the entitlement to make the assessments) are not in dispute.

Discussion

32. We find that HMRC did make a discovery and that they were entitled to make the assessments. This is for the following reasons.

33. The threshold for a discovery is that an officer came to a conclusion or satisfied himself as to an insufficiency of tax (see *Hankinson v Revenue and Customs Commissioners* [2011] EWCA Civ 1566). No new information of fact or law is required for a discovery (see *Charlton & Others v RCC* [2012] UKUT 770 (TCC)).

34. A discovery took place when Mr Smith concluded in his letter dated 9 October 2017 that no more information would be forthcoming in respect of the 2015/16 return and that the same approach should be taken for the previous years. We find that this was a conclusion reached by Mr Smith. In any event, we find that Mr Smith satisfied himself that there was an insufficiency of tax for previous years.

35. We do not accept that it would have been obvious from the returns that there was an insufficiency of tax. Such a conclusion would depend upon whether or not supporting information or documentation could be provided by Mr Burke or Kumarans. There is no suggestion that such information or documentation has ever been provided.

36. In any event, Mr Donohue and Mr Christie's argument focuses upon the information available for the purposes of the second condition under section 29(5) of the TMA 1970. However, HMRC rely upon the first condition under section 29(4) and therefore upon the basis of carelessness.

37. The conduct of an individual taxpayer is to be assessed by reference to a prudent and reasonable taxpayer in his position. We find that Mr Burke was careless. Mr Burke did not check the returns and did not check what the expenditure claimed related to or that it was correct. Further, there was no evidence as to what records and information Mr Burke gave to Kumarans. Crucially, it is not clear how the returns were filed without being signed by Mr Burke and so we find that it was careless for him to allow this to happen without the returns being considered by him first.

38. In any event, the relevant carelessness can also be in respect of Kumarans acting on Mr Burke's behalf. We find that Kumarans was careless in not providing the returns to Mr Burke to check or adequately checking with Mr Burke as to what his business expenditure was (there being no evidence that Kumarans did so and Mr Burke now accepting that the expenses were overstated – such acceptance being by virtue of his agreement with the amount of the assessments).

39. For completeness, we note that Mr Burke is critical of Kumarans failure to provide information and documentation in the course of the enquiry into the 2015/16 return. However, this does not affect the position as regards whether or not there was a discovery and whether or not Mr Burke or Kumarans were careless at the time of filing the returns.

40. We therefore uphold the discovery assessments.

THE PENALTY ASSESSMENTS

41. Given our findings as to the validity of the discovery assessments, and, given the agreement between the parties as to the amount of the penalties, the only issue in relation to the penalty assessments is as to whether or not HMRC have established that Mr Burke or someone acting on his behalf was careless. We repeat paragraphs 37 to 39 above to the effect that Mr Burke and Kumarans were careless. As such, we allow the appeal only to the extent of the agreed reductions to the penalty assessments.

DISPOSITION

42. It follows that we dismiss the appeal against the discovery assessments but allow it in respect of the penalty assessments to the extent agreed between the parties. As such:

- (1) The appeal against the discovery assessments is dismissed.
- (2) The appeal against the penalty assessments is allowed to the extent that the penalty for 2011/12 is reduced to £858.95, the penalty for 2012/13 is reduced to £1,146.96, the penalty for 2013/14 is reduced to £719.83 and the penalty for 2015/16 is reduced to £1,913.94.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD CHAPMAN QC
TRIBUNAL JUDGE
Release date: 05 FEBRUARY 2021